

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

No. 74-2658

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FRED STARK AND JAMAICA 201 ST. CORP., INC.
AND JAMAICA 202 ST. CORP., INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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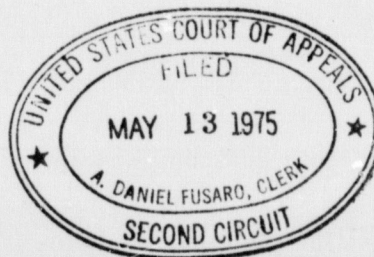
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Since the Board's findings in this case rest largely on credibility determinations, the scope of this Court's review is relatively limited. However, in an effort to cast doubt on some of the credibility determinations, the Company again asserts, as it did before the Board, that the Administrative Law Judge erred in denying its motion to separate witnesses (Br. 22-28). Although this issue was discussed in the Board's opening brief (p. 11, n.7), we wish to make the following additional comments.

The generally recognized rule, applicable to Board proceedings, is that "whether witnesses are to be separated or 'put under the rule,' is a matter resting in the sound discretion of the [trier of fact]." *N.L.R.B. v. Quality & Service Laundry, Inc.*, 131 F.2d 182, 183 (C.A. 4, 1942), cert. denied, 318 U.S. 775, and cases cited; see also *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 408 F.2d 374, 375 (C.A. 5, 1969); *N.L.R.B. v. Burke Machine Tool Co.*, 133 F.2d 618, 621 (C.A. 6, 1943). Accordingly, the Administrative Law Judge's exercise of his discretion will not be overturned unless it is clearly shown that he abused it. Here the Company has failed completely to show that the Administrative Law Judge abused his discretion, or that any prejudice to its case resulted from his failure to exclude witnesses.

Particular justification for the Administrative Law Judge's refusal to exclude witnesses here is provided by the fact the witnesses whom the Company sought to exclude were named in the complaint as discriminatees.¹ It is well settled that an alleged discriminatee is deemed to be a "party" to a Board proceeding and, as such, is entitled to remain in attendance throughout the entire hearing. *T. I. L. Sportwear Corp.*, 131 NLRB 176, 177 n.1, enf'd 302 F.2d 186 (C.A.D.C., 1962); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295, and cases cited, enf'd 291 F.2d 751 (C.A. 8, 1961); *Scott Gross Co.*, 197 NLRB 420, enf'd 477 F.2d 64 (C.A. 6, 1973); *Jaques Power Saw Co.*, 85 NLRB 440, 443 (1949); *Sopps, Inc.*, 189 NLRB 322 (1971). As the cited cases indicate, a discriminatee's status as a "party" is not dependent on his personally filing an unfair labor practice charge. Rather, as in the instant case, the charge may be filed on his behalf by a union. For no matter who files

¹ The Judge granted the Company's motion to exclude to the extent that it applied to witnesses who were not discriminatees (RA 1).

the charge, the discriminatee's rights under the Act are determined at the hearing, the reinstatement order runs in his favor and any back pay is awarded to him personally. Moreover, "[i]f the Board denies him relief, in whole or in part, he will be an 'aggrieved person' who can seek review of the Board's order in a United States Court of Appeals." *Sopps, Inc., supra*, 189 NLRB at 822, and cases cited at n.5.

Rule 615 of the new Federal Rules of Evidence, cited by the Company (Br. 26), does not help its case, but in fact fully supports the Board's position herein. While the new Rules do not become effective until July 1, 1975, and hence are not applicable to this proceeding, Rule 615 specifically states that it "does not authorize exclusion of . . . a party who is a natural person." Explaining this exception to the Rule, the Advisory Committee's Note states, "Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore [Evidence] §1841." 4 Jones on Evidence 543 (6th Ed.).

In sum, we submit that the Company's claim of error based on the Administrative Law Judge's denial of its motion to exclude discriminatee-witnesses from the hearing is totally without merit.²

² In its discussion (Br. 40) of the Board's finding that Peters was not a supervisor, the Company misstates the record. Thus, relying on testimony that was specifically *discredited* by the Administrative Law Judge, the Company asserts that Peters did not deny firing two or three employees and recommending that another be fired (A. 20). The Administrative Law Judge specifically *credited* Peters' denial that he ever fired or recommended the firing of anyone (A. 20; 226).

CONCLUSION

For the foregoing reasons and for those set forth in our opening brief, the Board respectfully requests that its order be enforced in full.

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